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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-797

THE MIAMI HERALD PUBLISHING COMPANY, etc.,

Appellant,

vs.

PAT L. TORNILLO, JR.,

Appellee.

On Appeal from the Supreme Court of Florida

AMICUS CURIAE BRIEF FOR TIMES PUBLISHING COMPANY

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INTEREST OF AMICUS CURIAE

Times Publishing Company is a Florida corporation which publishes two newspapers serving the West Coast of Florida, the St. Petersburg Times, a morning daily and Sunday newspaper, and the St. Petersburg Independent, an afternoon newspaper published daily except Sunday. Following commencement of the instant litigation against the Miami Herald, the Times Publishing Company had an action commenced against it by an unsuccessful political candidate who claims that the Times Publishing Company violated Section 104.38 Florida Statutes, 1971 (hereinafter referred to as F.S. 104.38), when it refused to publish his reply to an editorial which criticized the candidate's conduct of his campaign.

The primary interest of amicus curiae, notwithstanding its own litigation, is preservation of newspapers in their historic role as commentators upon the political scene independent of government control.

STATEMENT OF THE CASE

Amicus Curiae adopts Appellant's Statement of the case.

QUESTIONS PRESENTED FOR REVIEW

I. F.S. 104.38 VIOLATES THE GUARANTEE OF FREEDOM OF THE PRESS AS PROVIDED IN THE FIRST AMENDMENT.

II. F.S. 104.38 MAKES DISTINCTIONS AMONG PERSONS ADVERSELY AFFECTED, AMONG PERSONS BENEFITED, AND IN THE CONTENT OF PUBLISHED MATTER, EACH OF WHICH ARE IMPERMISSIBLE UNDER THE FIRST AND FOURTEENTH AMENDMENTS.

III. THE FLORIDA REPLY LAW DEPRIVES NEWSPAPER PUBLISHERS OF PROPERTY WITHOUT JUST COMPENSATION OR DUE PROCESS OF LAW.

ARGUMENT

I.

F.S. 104.38 VIOLATES THE GUARANTEE OF FREEDOM OF THE PRESS AS PROVIDED IN THE FIRST AMENDMENT.

Amicus Curiae adopts the argument of Appellant and submits that this should be the determinative issue in this cause.

II.

F.S. 104.38 MAKES DISTINCTIONS AMONG PERSONS ADVERSELY AFFECTED, AMONG PERSONS BENEFITED, AND IN THE CONTENT OF PUBLISHED MATTER, EACH OF WHICH ARE IMPERMISSIBLE UNDER THE FIRST AND FOURTEENTH AMENDMENTS.

A. *Newspapers are selected from all other media to be subject to sanctions.*

F.S.104.38 (the Florida Reply statute) provides as follows:

> "*Newspaper assailing candidate in an election, space for reply.*—If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon request of such candidate immediately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to. Any person or firm failing to comply with the provisions of this section shall be guilty of a misdemeanor of the first degree, punishable as provided in §775.082 or §775.083."

Sections 775.082 and 775.083 Florida Statutes, 1971, provide penalties of one year imprisonment, a fine of one thousand dollars, or both for first degree misdemeanors.

In the context of First Amendment rights, newspapers have not been subject to classification from other forms of communication. This Court recently had occasion to consider the universal application of the First Amendment. In *Branzburg vs. Hayes,* 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972), the court, in denying a newsman's privilege to refuse to appear before grand juries stated:

> "Freedom of the press is a 'fundamental personal right' which 'is not confined to newspapers and periodicals. It necessarily embraces pamphlets . . . the press even in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.' "
>
> *Branzburg vs. Hayes,* 408 U.S. 704, 92 S.Ct. 2668, 33 L.Ed.2d 653.

Does the singling out of newspapers from all of the vehicles of information and opinion meet the equal protection standards imposed by the Fourteenth Amendment where fundamental personal rights are subjected to a special burden? In recent cases involving discriminatory laws affecting First Amendment rights, this court has caused such laws to be "carefully scrutinized" required that they be "narrowly tailored to their legitimate objectives" and required that discriminatory classification abridging fundamental rights be "necessary to promote a compelling governmental interest." *Police Department of City of Chicago vs. Mosley,* 408 U.S. 92, 99, 92 S.Ct. 2286, 2292, 33 L.Ed.2d 212, 218 (1972); *Dunn vs. Blumstein,* 405 U.S. 330, 335, 92 S.Ct. 995, 999, 31 L.Ed.2d 274, 280 (1972); *Williams vs. Rhodes,* 393 U.S. 23, 32, 89 S.Ct. 5, 11, 21 L.Ed.2d 24, 32 (1968).

There is no characteristic of a newspaper germane to the election process that (laying aside pure First Amendment considerations) significantly distinguishes it from speech, a pamphlet, a letter mailing, picketing, a weekly magazine or any other form of communication conveying the same message. For example, a speaker could be compelled to speak a reply, the publisher of a massive letter mailing could be compelled to reproduce and mail out a reply. The classification is patently not tailored to achieve any legitimate state goal. *Kramer vs. Union Free School District,* 395 U.S. 621, 632, 89 S.Ct. 1886, 1892, 23 L.Ed.2d 583, 592 (1969).

The classification of newspapers does not comport with the Fourteenth Amendment mandate of equal protection under the law and F.S. 104.38 is therefore unconstitutional.

B. *The Florida Reply statute imposes a special obligation based upon content of expression.*

The special obligation of publishing a reply is imposed by F.S. 104.38 only upon printed speech in a newspaper which "assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record." If one publishes such statements, whether true or false, fact or opinion, under the Florida Reply statute the publisher acquires the obligation of printing the candidate's reply even though the reply be the antithesis of the publisher's beliefs, political philosophy, and that of the dues payers, subscribers, and advertisers who support the newspaper for their own particular reasons. No similar burden is imposed upon all other expression heretofore protected by the First Amendment.

The Florida Reply statute suffers from the same constitutional defect existent in the City of Chicago ordinance at issue in *Police Department of City of Chicago vs. Mosley*, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed. 2d 212 (1972). Both statutes impose selective burdens on lawful expression determined by content.

> "The central problem with Chicago's ordinance is that it describes permissible picketing in terms of its subject matter. Peaceful picketing on the subject of a school's labor-management dispute is permitted, but all other peaceful picketing is prohibited. *The operative distinction is the message on a picket sign.* But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." (Emphasis supplied).
>
> *Police Department of City of Chicago vs. Mosley*, 408 U.S. 95, 92 S.Ct. 2290, and 33 L.Ed.2d 216.

The Equal Protection Clause prevented the City of Chicago from discriminating among pickets by reason of the content of their signs and the Equal Protection Clause prevents the State of Florida from subjecting newspaper publishers who comment on the fitness of political candidates from being subjected to the onerous burdens imposed by F.S. 104.38.

C. *The Florida Reply statute discriminates as to the classes of persons to be accorded the extraordinary right of access to privately owned newspapers.*

The issue of whether there is sufficient state involvement in the publication of newspapers for there to be "state action" respecting access has been vigorously

litigated of late. *Cook vs. Advertiser Co., Inc.*, 323 F.Supp. 1212 (D.C. Ala. 1971), aff'd 458 F.2d 1119 (5th Cir. 1972); *Associates and Aldrich Co. vs. Times Mirror Co.*, 440 F.2d 133 (9th Cir. 1971); *Chicago Joint Board, Amalgamated Clothing Workers of America, AFL-CIO vs. Chicago Tribune Co., et al.*, 307 F.Supp. 422 (N. Dist. Ill. 1969), aff'd 435 F.2d 470 (7th Cir. 1970), *Cert. Den.* 402 U.S. 973, 91 S.Ct. 1662, 29 L.Ed.2d 138 (1971); *Resident Participation of Denver, Inc. vs. Love*, 322 F.Supp. 1100 (D.C. Colo. 1971).

The uniform result has been recognition of the historic dissociation between the government and the press and a finding there being no "state action" involved in the refusal of a publisher of a private newspaper to print proffered material, whether commercial, editorial, social, or political. If it is determined that the state can compel publication of a reply in a privately owned newspaper the historic dissociation between the state and the newspaper no longer pertains. There is then "state action" with respect to access to the newspaper and with it the concurrent obligation of insuring equal protection to all under the Fourteenth Amendment. Each class to be granted the extraordinary privilege of using the press of another must be selected in a non-discriminatory manner. Where a few are afforded a special privilege, all others similarly situated are correspondingly deprived. Cf. *Police Department of City of Chicago vs. Mosley*, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972); *Dunn vs. Blumstein*, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972); and *Kramer vs. Union Free School District*, 395 U.S. 699, 89 S.Ct. 1886, 23 L.Ed.2d 583 (1969).

The classification involved in the Florida Reply statute fails on two counts: (1) The classification is

not tailored to achieve any legitimate objective and (2) There is and has been no showing of a compelling state interest sufficient to justify the abridgment of First Amendment freedoms and the discriminatory classification.

Under the Florida law, the privilege of compelling another person to surrender the use of their press is limited to political candidates and to no others. Suppose a Florida newspaper accuses John Brown, a political candidate, and Joe Smith, who is not a political candidate, with being purveyors of pornography in the community. Regardless of whether the accusation is true or false, John Brown gets a reply solely by reason of being a political candidate. Joe Smith does not. In *Rosenbloom vs. Metromedia,* 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971), this Court laid to rest any distinction, as far as the guarantee of freedom of the press is concerned, among public officials, public figures, and theretofore private persons involved in newsworthy events. Candidate Brown and private citizen Smith are similarly situated. There is no rational basis for the classification unless it can be found in some compelling state interest respecting political candidates.

The Florida Supreme Court identified the state's interest in this classification as:

> "a part of a centuries old legislative task of *maintaining conditions conducive to free and fair elections.* The Legislature in 1913 decided that owners of the printing press had already achieved such political clout that when they engaged in character assailings, the victim's electoral chances were unduly and improperly diminished. To assure fairness in campaigns, the assailed candidate had to be provided an equivalent opportunity to respond; other-

wise not only the candidate would be hurt but also the people would be deprived of both sides of the controversy." (Emphasis supplied by the court).

Tornillo vs. The Miami Herald Publishing Company, 287 So.2d 78, 81 (Fla. 1973).

This is unquestionably a legitimate objective but there is no compelling need to promote this objective by the methods of the Florida Reply Law. In pursuing an important interest, "the State cannot chose means that unnecessarily burden or restrict constitutionally protected activity." *Dunn vs. Blumstein,* 405 U.S. 343, 92 S.Ct. 995, 31 L.Ed.2d 285.

Unlike the broadcast media, newspapers are not "public trustees" of a scarce public resource. Their First Amendment rights are not "abridgable." They cannot be compelled to devote portions of their publication to matters of public interest as a condition to retaining the right to publish. *Columbia Broadcasting System vs. Democratic National Committee,* 412 U.S. 94, 93 S.Ct. 2080, 36 L.Ed.2d 772 (1973).

If the compelling state interest underlying F.S. 104.38 is the promotion of fair elections by the means of causing both sides of a political controversy to be published in newspapers the purpose is subject to total frustration by newspapers adopting the simple expedient of making no comment concerning political candidates. Such a course is encouraged by the reply burden and criminal penalties. Being counter-productive, the Florida Reply Law is obviously not necessary to accomplishment of its alleged governmental purpose.

The heavy burden of justification rests upon the state. *Dunn vs. Blumstein,* 405 U.S. 342, 92 S.Ct. 1003, 31 L.Ed.2d 284. There is no record before this court that F.S. 104.38 has made even the minutest contribution to political dialogue in the State of Florida and it follows that there is nothing to demonstrate that the burden imposed by this statute is necessary to promote such dialogue in the future.

The state has wholly failed to justify singling out political candidates from all other persons similarly situated to enjoy the benefit of a state compelled reply to adverse comment concerning them appearing in newspapers.

Each of the three classifications implicit in F.S. 104.38, namely those of persons benefited, persons adversely affected, and of content of published matter, are impermissible distinctions under the First and Fourteenth Amendments. The statute is unconstitutional.

III.

THE FLORIDA REPLY LAW DEPRIVES NEWSPAPER PUBLISHERS OF PROPERTY WITHOUT JUST COMPENSATION OR DUE PROCESS OF LAW.

A. *The First Amendment considerations are preeminent.*

As stated under Point I of this argument the First Amendment considerations in this cause are preeminent and certainly outweigh the property rights jeopardized by this unconstitutional law. The manner and degree of deprivation of the property rights, however, underscore the burden on the First Amendment rights and give substance to the chilling effect upon political comment caused by the Florida Reply Law.

B. *The taking of newspaper space for public purposes without just compensation is unconstitutional.*

A newspaper is the product of the publisher's labor, personal or employed, an investment in newsprint, materials, time and talent. A newspaper and the matter it contains is property, *International News Service vs. Associated Press,* 248 U.S. 215, 39 S.Ct. 68, 63 L.Ed. 211 (1918); *McGill, et al. vs. State,* 209 Ga. 500, 74 S.E.2d 78 (1953). The court may judicially notice that newspaper space is a relatively expensive commodity which is sold in units as small as a single line in a single column.

The Florida Reply Law requires publication of a free reply. Such a taking, assuming the law is truly intended to be for the public benefit, is in violation of the guarantees of just compensation and due process as provided in the Fifth and Fourteenth Amendments.

The Florida Reply Law is an illegal and unreasonable exercise of the police power.

This amicus curiae raised the issue of deprivation of property without due process in the Florida Supreme Court and that court responded that the Reply Law was a valid exercise of the police power. This it assuredly was not. A valid exercise of the police power includes the following characteristics:

1. Appropriate compensation to the owner if the destroyed or taken property has residual value, e.g., not infested, not in the path of fire.

2. A taking or regulation reasonably related to the public health, safety or welfare.

3. The proper official action is involved.

4. Notice and hearing are provided unless immediate danger requires otherwise.

See *Miller vs. Schoene,* 276 U.S. 272, 48 S.Ct. 246, 72 L.Ed. 568 (1928); *State Plant Board vs. Smith,* 110 So. 2d 401, 404, (Fla. 1959); Cf. *Bowditch vs. Boston,* 101 U.S. 16, 25 L.Ed. 980 (1880); *Southern R. Co. vs. Virginia,* 200 U.S. 190, 54 S.Ct. 148, 78 L.Ed. 260 (1933).

As stated above, the Florida Reply Law provides no compensation for valuable newspaper space. The relation to public health, safety and welfare is non-existent since the statute inhibits publication of true statements concerning a candidate's fitness and requires publication of any reply he may make, even if replete with false statements about his qualifications and fitness. The power to take over a newspaper publisher's press is vested in a private individual, not a government official. Such a delegation of the police power was declared unreasonable and a denial of due process in *Eubanks vs. City of Richmond,* 226 U.S. 137, 33 S.Ct. 76, 57 L.Ed. 156 (1912). Notwithstanding the absence of any imminent peril, the Florida Reply Law makes no provision for a judicial hearing to determine the applicability of the statute authorizing the taking. Cf. *Miller vs. Schoene, supra; Southern R. Co. vs. Virginia, supra.* The Florida Reply Law, lacking every fundamental requisite of due process, is violative of the Fifth and Fourteenth Amendments and must be found unconstitutional.

CONCLUSION

The Florida Supreme Court has attempted to relegislate a long forgotten political campaign law so as to introduce a substantial element of government control into the political content of newspapers. The Florida statute collides head-on with the First, Fifth and Fourteenth Amendments to the Constitution of the United States. The constitutional defects of the statute are fundamental and cannot be harmonized with established constitutional principles. The judgment of the Supreme Court of the State of Florida should be reversed.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Brief of Amicus Curiae were furnished by U.S. Mail this 22nd day of February, 1974, to Mr. Tobias Simon, Attorney for Appellee, 1492 South Miami Avenue, Miami, Florida 33130, and to Messrs. Daniel P. S. Paul and James W. Beasley, Jr. of Paul and Thomson, 1300 First National Bank Building, Miami, Florida 33131, Attorneys for Appellant, The Miami Herald Publishing Company.

By /s/ William C. Ballard
WILLIAM C. BALLARD